SUPREME COURT, U.S.
FILED
MAY 16 1994
OFFICE OF THE CLERK

No. 93-1655

In The

Supreme Court of the United States

October Term, 1993

MARSHA McMASTER,

Petitioner,

v.

IOWA BOARD OF PSYCHOLOGY EXAMINERS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

BONNIE J. CAMPBELL
Attorney General of Iowa

*GORDON E. ALLEN
Deputy Attorney General

MAUREEN McGUIRE
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-8760

Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ADDITIONAL STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING THE WRIT 5

I. THIS COURT LACKS JURISDICTION BECAUSE THERE IS NO ACTUAL CASE OR CONTROVERSY AS REQUIRED BY ARTICLE III OF THE CONSTITUTION 5

II. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT JUDGMENT AT ISSUE IS NOT A FINAL JUDGMENT FOR PURPOSES OF 28 U.S.C § 1257 6

III. THE IOWA SUPREME COURT'S DECISION THAT THE PRIVACY RIGHT IN MENTAL HEALTH RECORDS IS NOT ABSOLUTE DOES NOT PRESENT ANY IMPORTANT QUESTIONS OF FEDERAL LAW 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 7

Craven v. Bierring, 269 N.W.2d 801 (Iowa 1936) 8

Dent v. West Virginia, 129 U.S. 114 (1889) 8

Flynt v. Ohio, 451 U.S. 619 (1981) 6

McMaster v. Iowa Board of Psychology Examiners, No. 92-1904 (Iowa Sup. Ct. Dec. 22, 1993) 3, 4, 6

Moore v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 47 (1971) 5

Roe v. Wade, 410 U.S. 113 (1974) 7

State v. Otterholt, 15 N.W.2d 529 (Iowa 1944) 8

Uphaus v. Wyman, 360 U.S. 72 (1959) 6

Whalen v. Roe, 429 U.S. 589 (1977) 7

CONSTITUTION

United States Constitution, Article III 5

STATUTES

Iowa Code § 258A.6 (1991) 1, 3

Iowa Code § 272C.6 (1993) 1

Iowa Code § 622.10 (1993) 2, 3

28 U.S.C.A. § 1257 6

OTHER

13 Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction 2d. § 3530 (1984) 5

ADDITIONAL STATUTES INVOLVED

In addition to provisions included in the Petition's appendix, the following Iowa Statutes are relevant.

Iowa Code § 258A.6 (1991) Hearings – power of subpoenas – decisions. (currently § 272C.6 (1993))

> 3. The presiding officer of a hearing panel may issue subpoenas pursuant to rules of the board on behalf of the board or on behalf of the licensee. A licensee may have subpoenas issued on the licensee's behalf. A subpoena issued under the authority of a licensing board may compel the attendance of witnesses and the production of professional records, books, papers, correspondence and other records, whether or not privileged or confidential under law, which are deemed necessary as evidence in connection with a disciplinary proceeding.
>
> Nothing in this subsection shall be deemed to enable a licensing board to compel an attorney of the licensee, or stenographer or confidential clerk of the attorney, to disclose any information when privileged against disclosure by section 622.10. In the event of a refusal to obey a subpoena, the licensing board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena, and if the person fails to obey the order of the court the person may be found guilty of contempt of court. . . .

Iowa Code § 622.10 (1993) Communications in professional confidence – exceptions – application to court.

> A practicing attorney, counselor, physician, surgeon, physician's assistant, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline. . . .
>
> For the purposes of this section, "mental health professional" means a psychologist licensed under chapter 154B. . . .

STATEMENT OF THE CASE

The Iowa Board of Psychology Examiners (Board) issued a subpoena to Dr. Guenther, a psychologist, for the records of her patient, petitioner Marsha McManus. Although Dr. Guenther was not under investigation, McManus had previously been a patient of another psychologist who was under investigation by the Board at the time of issuance of the subpoena.

McManus filed an action in state district court to enjoin Dr. Guenther from complying with the subpoena alleging that the records were privileged and confidential pursuant to federal and state constitutional provisions and Iowa Code section 622.10. (Pet. App. 25-28) The

Board filed an action to enforce the subpoena asserting that its authority to subpoena such information under Iowa Code section 258A.6 abrogated any confidentiality in section 622.10. (Pet. App. 31-35)

The district court ruled that the subpoena should be enforced and that Iowa Code section 622.10 does not preclude the Board's authority to subpoena the information pursuant to Iowa Code section 258A.6. (Pet. App. 31-41)

Petitioner appealed to the Iowa Supreme Court arguing that Iowa Code section 622.10 precludes release of the subpoenaed information and that the release of such information would violate her constitutional right to privacy. (Pet. App. 2)

The Iowa Supreme Court found that Iowa Code section 622.10 did not bar disclosure of the information but that the petitioner did have a constitutional right of privacy in the records. *McMaster v. Iowa Board of Psychology Examiners*, No. 92-1904 (Iowa Sup. Ct. Dec. 22, 1993). (Pet. App. 1-24) The court found that constitutional right to be qualified, however, and remanded the case to the district court to allow the Board to produce evidence that its need for the records outweighed the petitioner's constitutional right to privacy. The evidentiary hearing has not yet been held. The records at present have not been produced, and McManus' constitutional right to privacy remains.

SUMMARY OF THE ARGUMENT

McManus' first issue presents no question for review. The Iowa Supreme Court found that the records of a mental health professional are constitutionally protected in *McMaster v. Iowa Board of Psychology Examiners*, (Pet. App. 1). Because there is no dispute that there is a constitutional right to privacy, there is no case or controversy and thus no jurisdiction to review this issue.

The state court ruling that is the subject of this action is not a final judgment for purposes of review. The Iowa Supreme Court found that the right to privacy was qualified and that the respondent could overcome that right. The court remanded the matter to the district court to allow the Board to demonstrate that its need for the subpoenaed records overcomes petitioner's right to privacy. Because the Iowa Supreme Court's ruling remanded the matter for further evidentiary findings, it is not a final judgment. This Court lacks jurisdiction.

The Iowa Supreme Court's ruling does not raise a substantial federal question. This Court has previously found that the constitutional right to privacy is not absolute and may give way to a compelling, legitimate state interest. The Iowa Supreme Court has not deviated from this.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION BECAUSE THERE IS NO ACTUAL CASE OR CONTROVERSY AS REQUIRED BY ARTICLE III OF THE CONSTITUTION.

The Iowa Supreme Court held that the records of a treating psychologist are indeed constitutionally protected. The Board does not challenge that ruling. Because there is no dispute that there is such a constitutional right, there is no case or controversy and thus no jurisdiction to review this issue.

To establish jurisdiction, Article III of the United States Constitution requires that there be a case or controversy. If both parties affirmatively seek the same result, there is no case or controversy and thus no jurisdiction. *See* 13 Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction 2d. § 3530 (1984).

In *Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47 (1971) the Supreme Court found no case or controversy and dismissed the case for lack of jurisdiction when both parties sought the same result. The Court stated "[w]e are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Id.* at 48.

In this case, McManus argued before the Iowa Supreme Court that the right to privacy in the records of a mental health professional is constitutionally protected.

(Pet. App. 7) The Iowa Supreme Court agreed. In *McMaster v. Iowa Board of Psychology Examiners*, the court stated "[t]hough not all courts agree, the majority of them hold that the right of privacy should extend to the patient records of mental health professionals. (cites omitted) We join those courts that extend constitutional protection to such records." (Pet. App. 8)

As both McManus and the Board agree that the patient records of mental health professionals are constitutionally protected, there is no case or controversy and this Court lacks jurisdiction in this matter.

II. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT JUDGMENT AT ISSUE IS NOT A FINAL JUDGMENT FOR PURPOSES OF 28 U.S.C § 1257.

Only final judgments of a state court may be reviewed by this Court. *See* 28 U.S.C.A. § 1257. This state court ruling is not a final judgment.

Generally, when anything further remains to be determined by a state court, there is not a final judgment and this Court lacks jurisdiction. *See Flynt v. Ohio*, 451 U.S. 619 (1981). *See also Uphaus v. Wyman*, 360 U.S. 72 (1959) (not a final judgment when the state supreme court remanded to the trial court to determine whether to enforce a subpoena).

The Iowa Supreme Court established criteria that must be met by the Board in order to overcome the right to privacy and obtain the subpoenaed records. *See McMaster v. Iowa Board of Psychology Examiners*, (Pet. App.

1). The Court remanded to the district court to allow the Board to meet these criteria. The hearing has not been held. The records have not been ordered produced.

Until the district court makes a determination of whether the Board is entitled to the subpoenaed records, there is no final judgment for review.

III. THE IOWA SUPREME COURT'S DECISION THAT THE PRIVACY RIGHT IN MENTAL HEALTH RECORDS IS NOT ABSOLUTE DOES NOT PRESENT ANY IMPORTANT QUESTIONS OF FEDERAL LAW.

McManus suggests the right to privacy in records of a mental health professional is absolute. McManus further suggests the Iowa Supreme Court allowed an unconstitutional intrusion on that right by allowing the Board to make a showing to overcome the qualified right to privacy. Neither suggestion raises a substantial federal question.

The constitutional right to privacy is not absolute. The right to privacy may give way to a compelling and legitimate state interest. *See Roe v. Wade*, 410 U.S. 113 (1974) (state's interest in protecting the life and health of the mother and child override the mother's right to privacy); *Whalen v. Roe*, 429 U.S. 589 (1977) (state's interest in controlling drug abuse by requiring reporting of prescriptions of certain drugs did not violate the constitutional right to privacy); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (reaffirms *Roe v. Wade* right to privacy is not absolute).

Iowa has not deviated from this Court's decisions in finding the right to privacy is not absolute and its ruling is in compliance with such decisions. (Sup. Ct. Rule 10)

Iowa has a legitimate and compelling interest under its police power in regulating professional practice, long recognized by the Supreme Court. *See Dent v. West Virginia,* 129 U.S. 114 (1889). *See also State v. Otterholt,* 15 N.W.2d 529 (Iowa 1944); *Craven v. Bierring,* 269 N.W.2d 801 (Iowa 1936).

The determination whether the Board has a legitimate and sufficient interest in the records to overcome McManus' privacy right is based on the specific facts of the case. No determination has yet been made.

CONCLUSION

For the above stated reasons, the Iowa Board of Psychology Examiners respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

BONNIE J. CAMPBELL
Attorney General of Iowa

*GORDON E. ALLEN
Deputy Attorney General

MAUREEN MCGUIRE
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-8760

Counsel for Respondent
*Counsel of Record